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JOSEPH E. SPANIOLO, JR.  
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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1989

NORFOLK AND WESTERN RAILWAY COMPANY and  
SOUTHERN RAILWAY COMPANY,  
*Petitioners,*

v.

AMERICAN TRAIN DISPATCHERS ASSOCIATION,  
INTERSTATE COMMERCE COMMISSION and  
UNITED STATES OF AMERICA,  
*Respondents.*

**On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The District Of Columbia Circuit**

**PETITIONERS' REPLY TO BRIEFS IN OPPOSITION**

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**No. 89-1027**

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The federal respondents and respondent American Train Dispatchers Association misapprehend the significance of what the Court of Appeals has already done, and attach too much significance to what the Interstate Commerce Commission may possibly decide to do in the wake of the Court of Appeals' decision. The Court of Appeals' misinterpretation of the scope of the 49 U.S.C. § 11341(a) exemption "from all other

law" will adversely affect these petitioners and all other railroads *now*, in matters that have nothing to do with ICC review of arbitration awards rendered under the employee protective conditions mandated by 49 U.S.C. § 11347, and in forums other than the ICC. Nothing the ICC does in its eventual action in the proceedings on remand will change this situation.

1. The ICC's holding on remand, whatever it may be, will not define the limits of the reach and operation of the § 11341(a) exemption "from all other law." The exemption is self-executing; it does not depend on ICC action at all, beyond the initial approval of the transaction to which the exemption attaches. *Schwabacher v. United States*, 334 U.S. 182, 194-95 (1948). The ICC is not charged with sole responsibility for determining whether a railroad may claim the benefit of the exemption. *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 300 n.13 (1987) (Stevens, J., concurring) ("Any tribunal that is faced with a claim that a party is violating some 'other law' has the responsibility of determining whether an exemption is 'necessary to let that person carry out the transaction . . . .'" (quoting 49 U.S.C. § 11341; emphasis added)).

2. Contrary to the suggestion of the federal respondents, Br. In Opposition at 11, no position that the ICC adopts will "obviate the difficulties entailed by the court of appeals' decision." That decision covered a far more extensive subject matter than will the ICC's decision on remand. The court concluded that the § 11341(a) exemption does not apply to labor agreements because, in the court's view, the exemption does not apply to *contracts* of any type. The Court of Appeals' decision, if not reversed here, will

obviously be influential (and binding, in the District of Columbia federal courts) in cases that involve contracts that are not labor agreements. The matters now pending before the ICC on remand, however, involve only Railway Labor Act claims, and the only agreements involved are labor agreements. The ICC's decision on remand will address no broader subject, for the Commission's charge from the Court of Appeals is to consider only (1) whether the § 11341(a) exemption overrides the Railway Labor Act; and (2) whether the § 11347 command to impose labor protection independently confers on the ICC the authority to preclude the assertion of Railway Labor Act claims in cases like this one. The ICC may well find its statutory authority sufficient to displace Railway Labor Act remedies and permit the modification of labor agreements. But this ruling would have no effect on the broader question whether the § 11341(a) exemption reaches other types of contracts.

3. There is no reason to think the Court of Appeals will reexamine the question whether the § 11341(a) exemption reaches contracts generally when the court reviews the ICC's eventual decision on remand. The ICC has said it does not dispute the court's holding,<sup>1</sup> and the court has already declined to rehear the case or consider it *en banc*. Meanwhile, the ability of these petitioners, and all other railroads, to carry out transactions that have been approved as in the public interest will remain vulnerable to defeat through claims asserted, in state and federal courts, under private contracts other than labor agreements—claims which

<sup>1</sup> *Brandywine Valley R.R.—Purchase—CSX Transportation, Inc.*, 5 I.C.C. 2d 764, 772 n.5 (1989), appeal docketed, No. 89-1503 (D.C. Cir. Aug. 21, 1989).

for forty-two years have been understood to be barred by the statutory exemption as authoritatively interpreted in *Schwabacher*.

#### CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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